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THOUGHTS ABOUT CORPORATE LAWYERS AFTER READING *THE CIGARETTE PAPERS*: HAS THE “WISE COUNSELOR” GIVEN WAY TO THE “HIRED GUN”?

Bruce A. Green*

INTRODUCTION

How do corporate lawyers view themselves and their work? Do they regard themselves as “wise counselors” to their corporate clients? Or do they consider themselves to be “hired guns?”

The “wise counselor” is the traditional conception of the lawyer who gives advice to major corporations and assists them in business transactions.¹ In this role, the corporate lawyer exercises independent judgment based on “standards that transcend his clients’ most immediate and narrow economic self-interest.”² The corporate lawyer “refers not only to specific rules of black-letter law, but also to general principles of equity, fair dealing, and public policy in dealing with inchoate or potential legal problems,” thereby “play[ing] a crucial role in pushing businesses toward socially responsible behavior.”³ In effect, the lawyer mediates between the private interests of the corporation and the regulatory interests of the state.

In recent decades, however, commentators have suggested that corporate lawyers are functioning more often as “hired guns,”⁴ a conception traditionally associated with courtroom advocates, not business lawyers. In the business context, the “hired gun” “acts as a cynical manipulator of the tools made available by a complex legal system.

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1. For a recent general history of the legal elite’s conception of the lawyer’s role, see Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the Lawyer’s Role*, U. CHICAGO ROUNDTABLE (forthcoming Dec. 2001). Pearce describes how elite lawyers viewed their role to be a governing class committed to the public good until the 1960s when they shifted to a hired gun approach.

2. Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 409-10 (1985).

3. *Id.* at 410; *accord id.* at 418 (stating “In the dominant image, the lawyer maintains a certain moral distance from his client [T]he influential and independent counselor would advise against and work to defeat corporate plans or tactics that, even if not clearly illegal, strike him as ill-advised or violative of inchoate, emerging norms of socially responsible business behavior.”).

4. See, e.g., Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294 (1985).

He takes advantage of the forms and the letter of the law, rather than the spirit or intent, to maximize his client's narrowly defined and essentially asocial goals."⁵ Typically, the corporate client's narrow goal is simply to maximize profit.

Although commentators may prefer the conception of the influential, independent counselor to that of the "hired gun,"⁶ they have acknowledged the difficulty of serving as a "wise counselor" and have expressed skepticism whether corporate lawyers today identify with this conception or act in accordance with it.⁷ Some have wondered wistfully whether "wise counselors" are a "vanishing breed."⁸

No one knows precisely how corporate lawyers envision their role and just how they function. There have been anecdotal descriptions and surveys addressing how individual lawyers conduct their corporate practices,⁹ but most work performed by corporate lawyers is nonpublic and confidential. Consequently, when detailed accounts of corporate law practice do emerge, and particularly when the described conduct is ethically questionable, these case studies¹⁰ prompt debate; such debates include whether the described conduct was typical or aberrational, whether it was laudable or condemnable, whether it ac-

5. Kagan & Rosen, *supra* note 2, at 419. *Accord id.* at 419-20 (sketching the "more extreme version of the 'manipulator' role," in which the corporate lawyer "actively influences the client's goals and policies. But in exerting influence, this attorney does not draw upon 'independent' standards rooted in the law, public policy, and common conceptions of fair dealing; instead, he takes as his normative benchmarks a cynical view of the law and a short-term profit-maximizing version of his client's . . . interests.").

6. See, e.g., James C. Freund, Comment, 37 STAN. L. REV. 301, 304 (1985); Philip D. Lochner, Jr., Comment, 37 STAN. L. REV. 305, 310-12 (1985).

7. See Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271, 274 (1985) (summarizing three studies collected in the Stanford symposium that were "concerned with the issue of lawyers' 'autonomy,' that is, with the extent that lawyers are able to influence the conceptualization and preferred solutions to their clients' legal problems: Each arrives at the tentative conclusion that outside lawyers on the whole have neither the opportunity nor the desire to reshape their clients' business or political goals and chiefly confine their goal to that of technical execution.").

8. Chayes & Chayes, *supra* note 4, at 293 n.47. A few have taken a more sanguine view. See, e.g., Freund, *supra* note 6, at 304 (stating "[W]e may mourn the undermining of the part of the professional relationship that charged us with responsibility for the client's overall well-being. But there is still ample opportunity to feel you are contributing. Ultimately, if you give good advice, it is usually followed."); Lochner, *supra* note 6, at 310-11 (suggesting that the disappearance of "wise counselors" was unproven; that the autonomy of outside corporate lawyers may have expanded because they now deal with in-house lawyers who "appreciate and understand the benefits;" and that their involvement in the "'breakdown' cases . . . makes outside counsel's role more important, not less.").

9. See Pearce, *infra* note 27 and accompanying text.

10. For a recent consideration of the role of case studies in legal ethics teaching and scholarship, see Carrie Menkel-Meadow, Foreword, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 64 FORDHAM L. REV. 787 (2000).

corded or departed from established professional norms, and why the lawyers conducted their practice in the described fashion. In recent years, the most prominent case studies of corporate law practice have involved law firms, such as Kaye Scholer, whose work on behalf of failed financial institutions came to light in the wake of government enforcement actions and civil lawsuits.

The Cigarette Papers,¹¹ which explores the work of tobacco industry lawyers, offers another interesting case study. In a recent article devoted primarily to the Kaye Scholer affair, Robert Gordon briefly suggested that in at least one respect this study of tobacco lawyers challenges the conventional understanding about corporate lawyers' work.¹² As Professor Gordon summarizes the story:

[Tobacco] industry lawyers for years took over direction of the industry's program of research into connections between smoking and health, partly to assure that the results of the research would favor the industry's claims, but also to support the argument (which the [tobacco industry] lawyers themselves recognized at the time was a dubious one) that the results of unfavorable research that contradicted the industry's representations to consumers and regulators would be protected from discovery by attorney-client privilege and work-product doctrines for years to come.¹³

Thus, when "the veil of confidentiality [was] lifted," tobacco industry lawyers were revealed to have been "cheerful abettor[s] of [their] clients' misdeeds"¹⁴ This story, says Professor Gordon, is at odds with "the legal profession's official position . . . that lawyers usually counsel clients to comply with the law and that 'almost all' clients comply."¹⁵

The account of tobacco industry lawyers at work invites renewed consideration of the conception of the corporate lawyer as a "wise counselor," if not from an empirical perspective then from a normative one. Was the conduct described in *The Cigarette Papers* at odds with what the legal profession has come to expect of corporate lawyers, as Robert Gordon suggests? It is attractive to think so, given the book's unappealing portrait of the tobacco industry and their lawyers. However, it can be argued that the described conduct of the tobacco lawyers largely accords with what the organized bar has generally come to expect of lawyers. Over time, the bar leaders' conception of

11. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

12. Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 *LAW & SOCIAL INQUIRY* 315, 316 (1998).

13. *Id.*

14. *Id.*

15. *Id.*

the corporate lawyer's role has shifted from the idea of the "wise counselor" to the idea of the "hired gun." The story of the tobacco industry lawyers is a dramatic example of the implications of that change.

This Article begins with some observations about the traditional conception of the corporate lawyer's role as "wise counselor" and summarizes the work of the tobacco industry lawyers depicted in *The Cigarette Papers*. Finally, this study is used as the point of departure for a consideration of the contemporary norms of corporate representation.

II. THE CORPORATE LAWYER AS "WISE COUNSELOR"

Comparatively few American lawyers serve as counsel to large corporations, but those who do have traditionally enjoyed a unique status within the legal profession and within society at large. This is true, in part, because corporate lawyers provide an important service to important clients. They influence corporate conduct, which in turn can have a significant impact on the public.¹⁶ No doubt, the special status of corporate lawyers, particularly those who are partners of prestigious corporate law firms, also reflects that, at least at one time, they were largely drawn from the highest echelon of society and, of course, regardless of their social class, could expect to be well remunerated.

The special status of corporate lawyers, however, can be ascribed to more than their power, prestige, social class, and wealth. In the past, these lawyers also have been considered by some to be morally or ethically exceptional. At moments in the last century when the legal profession was perceived to be on a moral decline, bar leaders looked to corporate counsel as professional exemplars. They were the profession's gray eminences. This was, to some extent, a matter of self-promotion: Those bar leaders who practiced corporate law naturally regarded themselves and their fellows as models. Additionally, the bar's leadership once purported to believe that lawyers' exemplary *personal* character, the presumed product of good breeding, would translate into exemplary *professional* character. Thus, the corporate bar's social and cultural advantage resulted in a presumption of moral superiority. But, one additional and significant source of the corporate bar's status was its professional ideology.

16. See, e.g., Gordon, *supra* note 7, at 271-72 (observing that corporate law firms "are important in the political economy, as negotiators between business corporations and the taxing and regulatory state, and as the primary interpreters to business of the mysteries of bureaucratic government.").

When contemporary critics, such as Mary Ann Glendon and Sol M. Linowitz, bemoan the moral decline of the legal profession, they typically identify the adversary ethic as symptomatic of the profession's ills while invoking the ethic of corporate counsel to exemplify what has been lost.¹⁷ The adversary ethic, which has been most persuasively explicated and championed by Monroe Freedman,¹⁸ is characterized by loyalty to the client, and the client's interests and objectives, often at the expense of the interests of the public and third parties. The advocate's extreme partisanship and moral neutrality are typically justified as necessary to assure just outcomes in adversary proceedings and to protect the client's dignity and autonomy.¹⁹ This conception of the lawyer's role is embodied in the metaphor of the lawyer as a "hired gun" and finds expression in Lord Brougham's frequently quoted claim: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."²⁰ In contrast, the traditional ethic of the corporate counselor is captured neatly by an observation attributed to Elihu Root: "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."²¹

In part, Root was describing how corporate lawyers at prestigious law firms supposedly conducted their practice. An important part of their work was advising corporate officers about how the law would apply to the corporation's proposed conduct. It was assumed that, as legal advisers, outside general counsel asserted moral influence and exercised professional detachment in ways that other lawyers did not and perhaps, as a practical matter, could not. The corporate lawyer's independence was tied to the diversity of the law firm's clientele.²² Any in-house lawyer who spent half his time telling corporate officers that they were "damned fools" might soon find himself out of a job.²³ Likewise, those in economically marginal practices could ill afford to

17. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS* 34-59 (1994); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION* 2-5, 10-11 (1994).

18. See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

19. See generally David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* (David Luban ed., 1984) (criticizing the conventional rationales for the adversary ethic); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589 (1985) (criticizing the theories that zealous advocacy is essential to assure just resolutions of disputes and that extreme partisanship is necessary to protect individuals' dignity and autonomy).

20. FREEDMAN, *supra* note 18, at 9 (quoting Trial of Queen Caroline 8 (1821)). There have been many other invocations of Lord Brougham's characterization of the advocate's role. See, e.g., ALAN DERSHOWITZ, *THE BEST DEFENSE* xv (1982).

21. GLENDON, *supra* note 17, at 37 (quoting Elihu Root).

22. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 69 (1978).

23. LINOWITZ, *supra* note 17, at 84.

alienate existing clients, much less prospective ones. Because outside corporate counsel was not economically dependent on any single client, and his law firm traditionally enjoyed a long-term relationship with its corporate clients, he could risk giving advice that corporate officers did not want to hear. To the extent that these lawyers were patricians who did not have to practice law as a livelihood, their economic independence was even greater. Further, corporate counselors could view their clients' conduct with greater objectivity than litigators, whose instinctive role, once a legal dispute between parties had arisen, was to identify with and advocate for their client's position.

Root's observation about the practice of a "decent lawyer" was also partly normative. As Mary Ann Glendon has discussed, decent lawyers were expected to be "wise counselors."²⁴ In rendering legal advice, they were supposed to exercise independent judgment, not extreme partisanship. And, they were expected to do so "in the spirit of public service."²⁵ Thus, the idea of law as a public calling meant something more than what it often means today—namely, representing some clients on an unpaid basis or interchanging private practice with public service. This idea also had significance for how one represented one's private clients, corporate clients in particular. It meant not only discouraging clients from engaging in illegal conduct, but also discouraging conduct that was antithetical to the "spirit" of the law or to moral or societal norms that were not embodied in enforceable law.²⁶ It might be questioned whether Root's conception of the "decent lawyer" was initially tied to corporate representation and then spilled over into other areas of representation, or whether it always related to all aspects of legal practice. Russell Pearce has taken the latter view, positing that Root's ideal reflected "[t]he legal elite's original and uniquely American understanding of the lawyer's role [as] America's governing class."²⁷ Even if so, the paradigmatic "wise counselors" and "decent lawyers" were the corporate counselors.

History does not record whether past generations of corporate lawyers widely shared Root's conception or generally acted in conformity with it, whether Root's ideal of the "decent lawyer" was embodied by only a handful of patrician practitioners who did not depend on law as

24. GLENDON, *supra* note 17, at 35.

25. *Id.* at 36.

26. *Id.* at 35, 37.

27. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, U. CHICAGO ROUNDTABLE (forthcoming Dec. 2001).

a livelihood, or whether Root was simply misguided or disingenuous. Those who mourn the profession's abandonment of Root's ideal assume that lawyers once practiced as Root preached. For example, Sol Linowitz has argued that "[t]oday there are too few lawyers who see it as part of their function to tell clients (especially new clients) that they are 'damned fools' and should stop" ²⁸ To commentators such as Linowitz, the history of the organized bar in America reads a bit like the myth of Sisyphus: When it formed the bar associations in the late nineteenth and early twentieth centuries, the professional elite successfully elevated the level of lawyer professionalism, which reached its apex in the period from the 1920s to the 1960s before beginning a long, slow decline. It is uncertain, however, even from the evidence marshaled by those who tell this tale, whether leaders of the corporate bar actually served in accordance with the ideal of independent lawyering that was espoused during the mid-century. Nor does it entirely matter.

By depicting themselves as "wise counselors," corporate lawyers bolstered their claim to unique status within the legal profession and, in turn, the legal profession's claim to unique status within society. Regardless of whether these claims were ever justified, they could plausibly be made. Can they plausibly be made today? Does the normative ideal of the "decent lawyer" have any remaining vitality for the corporate bar? Do corporate lawyers still depict themselves as "wise counselors?" Should they subscribe to this ideal? Can they realistically be expected to do so?

Studies of contemporary corporate law practice can shed light on these questions, but unfortunately such studies are infrequent,²⁹ perhaps because they are difficult to conduct. While it is possible to collect anecdotes or conduct surveys, it is hard to take a detailed look at what lawyers are actually doing in corporate practice. Unlike litigation, corporate counseling takes place entirely in private under a veil

28. LINOWITZ, *supra* note 17, at 4.

29. See Gordon, *supra* note 7, at 271 (observing that "it seems astonishing that law firms should have for so long remained almost unexplored in legal scholarship"). There are, of course, anecdotal writings about lawyers at corporate firms. See, e.g., JAMES B. STEWART, *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* (1983). There are also some studies based on surveys of such lawyers, including several in connection with the 1985 Stanford symposium. See Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985) (drawing on survey of lawyers at four Chicago law firms); see also Kagan & Rosen, *supra* note 2, at 430-34 (describing responses of 14 respondents to questionnaire).

of confidentiality.³⁰ Only on rare occasions is the veil lifted. One such occasion, however, was the disclosure several years ago of "the cigarette papers," a cache of internal memoranda relating to the work of tobacco company lawyers over the course of three decades near the end of the twentieth century. Linowitz has identified tobacco lawyers' conduct as emblematic of the abandonment of Elihu Root's ideal.³¹ The professional conduct depicted in the tobacco company memoranda invites renewed consideration of whether the ideal of the wise counselor does, should, and can have meaning for the corporate bar.

III. THE REVELATIONS OF *THE CIGARETTE PAPERS*

One day in 1994, California professor Stanton A. Glantz, received an unexpected delivery from an unnamed source. It was a treasure trove of thousands of documents, many marked "confidential," "privileged," or "attorney work product."³² The documents were internal memoranda of Brown and Williamson Tobacco Company (B&W) and its British corporate parent, British American Tobacco Company (BATCo),³³ which included many pages of correspondence between their company lawyers.³⁴

The internal documents spanned the early 1950s to the early 1980s,³⁵ a period when B&W and other U.S. tobacco companies saw legal trouble looming. As early as 1964, when the Surgeon General first issued a report identifying the health hazards of cigarette smoking, the tobacco industry came to fear the twin prospects of crippling government regulation and products liability lawsuits. Although B&W undertook research in the 1960s in the hope of developing a "safe" cigarette, by the late 1970s, it had abandoned that effort.³⁶ Instead, it concentrated its energies on a public relations campaign designed to cast doubt on the increasingly compelling scientific evidence that cigarette smoking was a major cause of cancer and heart disease, as well as an addiction. Essential to this campaign was the financial support that B&W and other U.S. tobacco companies provided to the Tobacco Industry Research Committee and its successor institution, the Council for Tobacco Research, for the ostensible purpose of fund-

30. Of course, much of litigation takes place in private as well. For an interesting collection of articles based on interviews with law firm litigators, see *Ethics: Beyond the Rules*, 67 *FORDHAM L. REV.* 691 (1998).

31. LINOWITZ, *supra* note 17, at 4.

32. GLANTZ ET AL., *supra* note 11, at xvii, 3, 6.

33. *Id.* at 5, 6.

34. *Id.* at 4.

35. *Id.* at 3, 6.

36. *Id.* at 108-70.

ing independent, objective scientific research into the health effects of cigarette smoking.³⁷ Thereby, the tobacco industry portrayed itself as a partner of the scientific community.

The B&W documents cast a ray of light, if only a narrow one, on the tobacco industry and its lawyers. These were, as it turned out, but a fraction of more than a million pages of internal documents that B&W and its attorneys generated and then placed in the hands of one of the company's outside law firms to review. In sum, the documents were undoubtedly, at best, a pale reflection of the actual deliberations, conversations, and interactions among the tobacco company executives and between them, their attorneys, and researchers. Even so, B&W promptly brought legal action for the return of the documents, which apparently had been stolen by a former paralegal of the company's law firm.³⁸

The courts rebuffed B&W's legal efforts,³⁹ finding that the public had an interest in access to the documents and that the company's claim of privilege was unavailing. At that point, Professor Glantz and his colleagues were free to mine the purloined memoranda, as well as related company documents that had become available.⁴⁰ They did so in a series of influential articles⁴¹ and a book entitled *The Cigarette Papers*.⁴² Based on the fragmented documentary record then available,⁴³ the book contrasts B&W's public acts and pronouncements with the company's private knowledge and conduct over the course of the three decades covered by the tobacco papers. In the process, the book describes the role of the company's lawyers in its public relations efforts.

Professor Glantz and his coauthors depict the tobacco company's public relations campaign as a massive fraud. Over the years, B&W conveyed publicly that tobacco had never been proven to cause cancer and heart disease, smoking was not addictive, and the tobacco industry was committed to researching the effects of smoking on public

37. *Id.* at 32-33.

38. GLANTZ ET AL., *supra* note 11, at 6-7.

39. *Id.* at 8-11.

40. *Id.* at 3, 6, 11.

41. *Id.* at 11.

42. *Id.*

43. In the years since the book was written, many more tobacco industry documents have been made public, including many that have yet to be analyzed. See, e.g., Michael Ravnitzky, *Tobacco docs archive revealed*, NAT'L L.J., Mar. 12, 2001, at 1 (discussing New York State's receipt of the archives of the Tobacco Institute and the Council for Tobacco Research, totaling more than 9,000 boxes of documents and noting the recent establishment of depositories for tobacco industry documents in Minnesota).

health.⁴⁴ But the internal records showed that B&W knew cigarette smoking causes disease and is addictive, and hid its research results.

The tobacco company's purported support for objective medical research was designed "to minimize the industry's exposure to litigation liability and additional government regulation,"⁴⁵ in large part by engendering a "false controversy" over the effects of cigarette smoking.⁴⁶ As acknowledged in a 1978 memorandum to B&W's CEO, the Council for Tobacco Research was intended to promote the tobacco industry's "public relations effort"⁴⁷ by allowing it to appear to be fulfilling its promises to study the diseases associated with smoking and to root out harmful elements from cigarettes. The Council, however, was anything but independent. Eventually its role in promoting the industry's political and legal efforts expanded to include developing research that could be used to respond to the claims of antismoking groups and locating sympathetic "scientists and medical doctors who might serve as industry witnesses in lawsuits or in a legislative forum."⁴⁸

The authors were particularly struck by the role played by B&W's lawyers.⁴⁹ Both inside and outside counsel made a major and indispensable contribution to the company's campaign to hoodwink the public. The lawyers served "not just as advisors but also as managers; they often decided which research would be done or not done, who would be funded, and what public relations and political actions would be pursued."⁵⁰ The company's campaign was, after all, not just a public relations or business strategy; it was a legal strategy. The lawyers oversaw the campaign, in part, because the public positions taken by the company were significant for its potential civil liability and for government regulation of the tobacco industry.⁵¹ The company's lawyers were assisted by the Council for Tobacco Research and by the Council's prestigious Washington, D.C. law firm.

Among other things, the lawyers developed and implemented a dubious strategy to allow B&W to utilize scientific research while minimizing the risk of its eventual discovery by outsiders. The idea was for the lawyers to assert control over much of the company's scientific research so that, if necessary, they could later claim that the materials

44. GLANTZ ET AL., *supra* note 11, at 2.

45. *Id.* at 2-4.

46. *Id.* at 2, 4, 40-44, 319-21.

47. *Id.* at 44.

48. *Id.* at 316-18.

49. *Id.* at 12.

50. GLANTZ ET AL., *supra* note 11, at 12.

51. *Id.* at 339-46.

were subject to the attorney-client privilege because the research had been conducted in anticipation of litigation. For example, the lawyers served as intermediaries for the receipt of scientific materials that the parent company and other affiliates generated. The lawyers selectively made these materials available to B&W's research staff. In this manner, the lawyers apparently sought to maintain two fictions: first, that the materials had initially been generated or procured at the lawyers' behest for litigation purposes, and, second, that the lawyers provided the materials to B&W personnel so that these personnel could assist the lawyers in their preparation for litigation.⁵²

The plan to disguise scientific research materials as litigation work product was only one scheme developed by the company's lawyers to shield prejudicial materials from the public; another was simply to destroy such materials or to ship them out of the country.⁵³ For example, in 1981, B&W's outside counsel proposed purging the company's files of data relating to harmful additives.⁵⁴ Four years later, the company's lawyers explored the possibility of ridding the company's files of problematic materials by labeling them "deadwood" and sending them overseas to BATCo, the parent corporation.⁵⁵ The internal memoranda reviewed by Glantz and his colleagues did not reflect whether either plan was carried out.⁵⁶

While endeavoring to conceal unfavorable research, tobacco industry lawyers participated in generating favorable research that might be used to cast doubt on the harmfulness of smoking or be otherwise employed in the tobacco industry's public relations campaign. Industry lawyers selected "special projects" to be funded by the supposedly independent Center for Tobacco Research.⁵⁷ Additionally, the lawyers controlled special accounts used to fund research directly.⁵⁸

In sum, *The Cigarette Papers* portray corporate lawyers playing a pervasive, long-term, and critically important part in "protecting [the tobacco industry's] ability to market an addictive product that kills its customers in epidemic numbers."⁵⁹ Indeed, Professor Glantz and his colleagues concluded that the lawyers' role, especially "in selecting research projects and methodologies and controlling the dissemination of results is perhaps, the most important insight offered by the docu-

52. *Id.* at 241-46.

53. *Id.* at 241.

54. *Id.* at 230.

55. GLANTZ ET AL., *supra* note 11, at 346-47.

56. *Id.*

57. *Id.* at 289-01.

58. *Id.* at 305-11.

59. *Id.* at 436.

ments.”⁶⁰ The lawyers decided “what research to do and how to do it,”⁶¹ and engaged in “a conscious effort to contain the dissemination of scientific information that might be adverse to the [tobacco] companies’ economic and legal interests,”⁶² including, in some instances, recommending that material be shipped off or destroyed.⁶³ The lawyers’ responsibility for overseeing scientific research and the dissemination of its results had nothing to do with learning the truth about the health effects of cigarette smoking, but rather “everything to do with protecting the political and legal position of the industry and protecting its profits.”⁶⁴

IV. THOUGHTS ABOUT TOBACCO LAWYERS, “WISE COUNSELORS” AND “HIRED GUNS”

Evidently, the corporate lawyers described in *The Cigarette Papers* did not regard themselves as “wise counselors.” B&W’s lawyers understood that their client was marketing a lethal product, that consumers lacked the tobacco industry’s knowledge of how clearly dangerous cigarettes were, and that the company wanted to deceive the public about the danger. Through these actions, they meant to discourage the government from protecting the public through regulation and to insure that if the truth later became known, its customers would have difficulty obtaining legal redress for death and disease resulting from the company’s conduct in marketing a lethal product without adequate warning. There is nothing in the authors’ account to suggest that, over the course of three decades, B&W’s lawyers made it their goal to persuade the tobacco company executives that they were “damned fools and should stop.”⁶⁵ On the contrary, B&W’s lawyers

60. *Id.* at 437.

61. GLANTZ ET AL., *supra* note 11, at 438.

62. *Id.* at 439.

63. *Id.* at 439.

64. *Id.* at 438.

65. As Professor Daynard pointed out to me at the DePaul symposium, the authors do describe a memorandum prepared in 1963 by Addison Yeaman, B&W’s general counsel, that might be viewed as an expression of a lawyer’s genuine effort to encourage socially responsible conduct on the part of his corporate client. Yeaman prepared the memorandum in anticipation of the Surgeon General’s 1964 report, which was expected to conclude that cigarettes caused cancer. *Id.* at 52. Yeaman proposed that B&W fund objective research into the health risks of smoking, market a cigarette that removes “whatever constituent of smoke is currently suspected[ed]” of causing cancer, and voluntarily place warnings on its packages. *Id.* at 52-55.

Glantz and his co-authors do not interpret Yeaman’s memorandum so benignly, however. *Id.* at 53 (observing: “At first glance, Yeaman’s statements appear to be motivated by a genuine desire to develop a ‘safe’ cigarette. He later makes clear, however, that a motivation behind this proposal is to allow the industry to be more vocal in its attacks on scientific research suggesting a causal link between smoking and disease.”). In their view, Yeaman was not seeking to persuade

worked "hand in glove" with the corporation in planning and executing a public relations campaign that many would regard as morally, if not legally, suspect. The lawyers were "hired guns."

As previously noted, Professor Gordon considered the tobacco lawyers' work to be a departure from the conventional professional expectation, as reflected in the model disciplinary rules adopted by the American Bar Association (ABA). He made reference to the ordinary expectation that lawyers, in their counseling role, will seek to avert their clients' misconduct by advising them, with expected success, to comport with the law. But other features of the ABA disciplinary rules and recent ABA pronouncements encourage corporate lawyers to conceive of themselves as "hired guns" and, in that role, to engage in the conduct like that described in *The Cigarette Papers*.

The ABA's current model disciplinary code, the Model Rules of Professional Conduct, seems, at best, indifferent to the idea that corporate lawyers should encourage socially responsible conduct. That is true, in part, because the line it draws between permissible and sanc-

B&W to stop marketing its dangerous product, but was proposing a strategy for B&W to continue doing so while "ward[ing] off potential lawsuits accusing [B&W] of failing to warn consumers of the dangers of smoking once the Surgeon General had issued" his report. *Id.* at 52.

This authors' reading of Yeaman's memorandum is supported by various passages quoted in their book. For example, Yeaman argued that any testing must be undertaken "with a commercial or political motive as well as a scientific motive" and pitched the proposed research campaign as enabling the tobacco industry to be more aggressive in its attack on the Surgeon General's report "by pointing out its gaps and omissions, its reliance on statistics, its lack of clinical evidence, etc., etc." July 16, 1963 memorandum of A. Yeaman, *quoted in* GLANTZ ET AL., *supra* note 11, at 53, 55. His idea was not necessarily to market a cigarette that was in fact safe, but for B&W to become the first company to make and sustain the marketing claim that it was supplying "a 'safer' smoke," by filtering out constituents of smoke that were suspected of causing such "unattractive side effects" as lung cancer, cardiovascular disorders, and emphysema, "while delivering full flavor—and incidentally—a nice jolt of nicotine." *Id.*, *quoted in* GLANTZ ET AL., *supra* note 11, at 54-55. Voluntary warnings, which Yeaman characterized as "so controversial a suggestion—indeed shocking—that I would rather not try to anticipate the arguments against it"—were offered, not to cut down on the incidence of smoking, but as a way for the company to bolster the "defense of assumption of risk" in litigation brought by future smokers. *Id.*, *quoted in* GLANTZ ET AL., *supra* note 11, at 54.

In light of these passages, it might be hard to view Yeaman's advice as a classic example of "wise counseling"—that is, as an invocation of principles of equity, fair dealing, and public policy in an effort to encourage socially responsible behavior. Nonetheless, other quoted passages lend support to Professor Daynard's suggestion that, in this particular instance, B&W's lawyer was acting "[i]n the 'wise counsel' mode"—that is, "[he] was urging his client to take the long view, putting up with reduced sales and greater liability exposure in the short term, in exchange for reestablishing the industry on a solid, ethical, and in the long run, more legally defensible posture." Richard A. Daynard, *Hired Guns, Adversaries, or White-Collar Killers: Comment on Professor Green's and Redish's Views of Tobacco Lawyers*, 51 DePaul L. Rev. 449, 451 (2001). Ultimately, in this respect as in many others, the documentary record as described by Glantz and his coauthors does not provide a clear and definitive account of what the tobacco lawyers did, knew, and intended, and leaves room to draw competing inferences.

tionable attorney conduct depends centrally on whether the client's conduct is known to be criminal or fraudulent. Lawyers may not advise clients to act criminally or fraudulently⁶⁶ and may not knowingly assist clients in criminal or fraudulent behavior.⁶⁷ However, they may assist clients in conduct that is immoral,⁶⁸ unconscionable, or even *illegal* as distinguished from *criminal*.⁶⁹ Nothing in the Model Rules encourages lawyers to refrain from assisting clients engaged in morally reprehensible conduct or exhorts lawyers to discourage clients from engaging in harmful or antisocial behavior.⁷⁰ Further, nothing encourages lawyers to dissociate themselves from client conduct that is *potentially* criminal or that is merely *suspected* of being criminal. Lawyers may easily get the message that it is not only perfectly permissible from a disciplinary perspective, but perfectly acceptable from a normative perspective for lawyers to assist clients in conduct that is immoral, antisocial, or legally questionable.

Even the demand that lawyers dissociate themselves from their clients' known criminal conduct is a qualified one. The ABA's discipli-

66. MODEL RULES OF PROF. CONDUCT R. 1.2(d) (1993).

67. *Id.* Even the restriction on assisting clients in criminal or fraudulent conduct has significant limitations. For example, disciplinary rules do not forbid a lawyer from rendering legal assistance to a client known to be acting criminally or fraudulently, as long as the lawyer does not assist the criminal or fraudulent aspects of the clients' conduct or otherwise promote the misconduct. The lawyer has no obligation to deprive the client of legal services altogether in order to dissociate himself from the scofflaw client, or to attempt to influence the client to walk the straight and narrow.

68. The disciplinary provisions of the Model Rules contemplate that lawyers will sometimes choose to assist clients in immoral conduct, although they are not generally compelled to do so. Lawyers may turn down judicial assignments that would involve assisting morally reprehensible conduct. See MODEL RULES OF PROF. CONDUCT R. 6.2(c)(1993). They may turn down proposed engagements on the same ground. Further, lawyers may also terminate an ongoing representation that would otherwise require assisting conduct that is repugnant. See *id.*, R. 1.16(b)(3). This is left to the lawyer's discretion.

69. In the early 1980s, when the ABA adopted the Model Rules of Professional Conduct in place of the Model Code of Professional Responsibility, the ABA decided to eliminate the earlier disciplinary prohibition against knowingly aiding illegal conduct, MODEL CODE OF PROF. RESPONSIBILITY R. 7-102(A)(7)(1980). See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 694-95 (1986).

70. The reason for the ABA's silence is not necessarily because its drafters meant to endorse a conception of corporate counselors as hired guns. In general, as a matter of policy, the drafters chose to eschew the kind of hortatory rhetoric contained in the ABA's earlier codifications of professional standards. They were concerned that exhortatory or aspirational statements might be misread as disciplinary standards or construed to be the prevailing professional standard for purposes of malpractice actions. The Model Rules are designed exclusively as a model disciplinary code, however they may be employed. Consequently, with the exception of state ethics codes that are still based on the earlier Model Code of Professional Responsibility, the current professional codes do not take it upon themselves to suggest how lawyers should conceptualize their role within the confines of the disciplinary rules or to exhort lawyers to engage in pro-social behavior that, although not required, is permissible and desirable.

nary rules permit, if not encourage, lawyers to act at the margins of the law, test the limits of the law, interpret the law and facts in a partisan manner, and exploit legal ambiguity. This attitude starts with the idea that a lawyer in adversary proceedings may make any nonfrivolous legal and factual arguments to the court that will then resolve the disputed question.⁷¹ As the ABA's previous disciplinary code recognized, this partisan approach makes sense when it comes to the judicial resolution of disputed legal and factual questions,⁷² but not when it comes to advising clients about current or future conduct that is not the subject of adjudication.⁷³ Nevertheless, the general attitude of partisanship that advocates adopt before the court typically spills over into other aspects of their work, such as discovery and witness preparation. Rather than erring on the side of caution or resolving legal and factual ambiguity in the manner that seems objectively most reasonable, advocates consider it permissible, if not obligatory as a matter of zealous representation, to resolve legal and factual ambiguities in the client's favor.⁷⁴ For example, lawyers may adopt the most restrictive, plausible interpretation of their discovery obligations or ignore suspicions of client or witness perjury.

Although commentators, such as David Luban and Deborah Rhode, have questioned whether the adversary ethic is justified even in adversary proceedings,⁷⁵ the philosophical movement within the practicing bar has been for the adversary ethic to spill over from adjudicative proceedings into corporate representation that occurs outside the adjudicatory context.⁷⁶ The ABA capped this movement in 1994 when it filed an *amicus curiae* brief in the U.S. Supreme Court in support of *O'Melveny & Myers*⁷⁷ in a lawsuit brought by the Federal Deposit Insurance Corporation (FDIC). In its brief, the ABA declared

71. If the lawyer's argument addresses the legality of the client's past conduct, making aggressive legal arguments can be justified on the theory that as a matter of individual dignity the client is entitled to draw on the lawyer's legal skill and acumen to defend the past conduct on any available grounds, or that the optimal resolution of the legal question will result from such advocacy. If the lawyer's argument addresses the legality of his own or his client's future conduct, the justification may be that a partisan reading of the law is harmless since there is a neutral arbiter to police their conduct.

72. MODEL CODE OF PROF. RESPONSIBILITY EC 7-3, 7-4 (1980).

73. *Id.* EC 7-3, 7-5.

74. See generally Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687 (1991).

75. See *supra* note 19.

76. This, of course, creates a tension between the organized bar and federal regulatory agencies which believe that corporate lawyers should serve in a less partisan manner. See generally Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1991).

77. Brief for the A.B.A. as *Amicus Curiae* in Support of Petitioner, *O'Melveny & Myers v. FDIC*, No. 93-489, 1993 LEXIS U.S. Briefs 489 (Jan. 13, 1994) [hereinafter ABA Brief].

that business representation is a form of advocacy; a version of the adversary ethic is, therefore, appropriate to business representation, and the Supreme Court should, therefore, reject a broad theory of civil liability that would discourage corporate lawyers from acting in accordance with adversary norms.⁷⁸

In particular, the ABA took the position that “progressive advocacy” is important in “modern business lawyering.”⁷⁹ In other words, “imaginative lawyering” is desirable in areas where the law is ambiguous, often deliberately so.⁸⁰ Its brief declared, “Even where the lawyer’s advice or advocacy has proven mistaken, the courts have not suggested that it should never have taken place at all.”⁸¹ Although a lawyer should never “ignore applicable law or regulations, or aid or counsel actions that the lawyer has reason to believe would be in violation of the law,” a lawyer should not be subject to liability for “the consequence of honest but mistaken lawyering” or for violating a supposed “duty to ferret out fraudulent misrepresentations by the client even where the lawyer has no reason to suspect this fraud”⁸² Liability on either of these bases would lead lawyers, as a matter of prudence, to “err in the direction of the views the lawyer believes the agency might take,” which would be inappropriate “to a legal system such as ours that embraces — indeed depends on — robust and progressive (albeit responsible) legal representation of clients, whether they be individuals or corporations.”⁸³

At least three aspects of the ABA’s position undercut the idea of the “wise counselor.” First, the ABA saw no difference between the norms relevant to representing an individual and those relevant to representing a corporation. Insofar as the tradition of independent corporate representation presupposes that there is something different about either corporate representation or corporations as clients (e.g., that they have social responsibilities different from those of individual clients), the ABA tacitly rejected that premise. Second, the ABA drew an explicit analogy between giving legal advice to a corporation concerning its future compliance with regulatory provisions and

78. In adopting this position, the ABA drew upon a draft report published a year earlier by an ABA working group but never adopted in final form. See *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession*, Report by the ABA Working Group on Lawyers’ Representation of Regulated Clients (Discussion Draft Jan. 1993).

79. ABA Brief, *supra* note 77, at 16.

80. *Id.* at 17.

81. *Id.*

82. *Id.* at 17-18.

83. *Id.* at 18.

advocating for a client at trial.⁸⁴ The ABA's position seems to be that although the attorney is not a full-fledged "hired gun," aspects of the adversary ethic nevertheless apply. Third, it endorsed the idea that in advising the corporate client and planning its future activities, lawyers may engage in imaginative and robust lawyering, which, despite some qualifying language, would be read by many to mean that corporate

84. Although Ethical Considerations 7-4 and 7-5 of the ABA Model Code of Professional Responsibility drew a sharp distinction between advocacy and counseling, the nature of law practice on behalf of corporate clients has become more varied and complex, with the result that the point where advocacy ends and counseling begins, has become increasingly indistinct. Consider, for example, a corporate client that has been accused by the U.S. government of underpaying federal taxes. If the corporation is indicted for tax fraud, its criminal defense attorney will function in accordance with the adversary, or "hired gun," ethic. Likewise, if the government brings a civil case for recovery of taxes owed, the corporation's attorney will offer the best defense of the corporation's past conduct. Nor is the lawyer's advocacy role limited to the courtroom; it applies to regulatory or administrative proceedings where the client is opposed by the government or a private party. For example, the lawyer's role would not be viewed differently if the corporation were opposed before an I.R.S. administrative tribunal rather than the tax court.

One might argue that the adversary approach is justified in all these contexts because the attorney is defending the corporate client's past conduct, rather than assisting the corporation regarding future conduct. However, this distinction may not be a meaningful one. Suppose the government is seeking an injunction to require the corporation to change its practices for purposes of its future tax filings. The corporate attorney's approach probably would not change, even if successful advocacy might enable the client to engage in future tax violations. Lawyers approach injunctive proceedings in the same way they approach proceedings to redress past wrongs as well. The lawyer would perform as an advocate because there is an advocate on the other side. The expectation would be that, through the clash of the opposing attorneys, making legal and factual arguments that best promote their respective clients' positions, the truth will emerge.

Does the corporate lawyer's approach change when there is not yet an adversary on the other side—when, for example, a regulatory agency is investigating the client's practices but has not yet determined that the practices are unlawful? Many would say no. Suppose, for example, that the federal prosecutors were considering whether to indict the corporation for tax evasion. The corporation's lawyer might meet with the prosecutors to try to convince them that they should not indict because the corporation had acted lawfully. While the corporate attorney could not lie or mislead, the attorney would be expected to make the best arguments on behalf of the corporation and would not be expected to volunteer negative information. Suppose that federal regulatory authorities—for example, IRS officials—were the ones conducting the investigation. Most corporate lawyers would not think that their role was different. This is true even though the attorney may have knowledge that the regulatory agency does not possess information that tends to establish that the corporation's conduct is impermissible, and the result of successful advocacy will be to allow the corporation's misconduct to continue.

Does the corporate lawyer's approach change when he is advising the client about the lawfulness of its future conduct and assisting the client in structuring that conduct, rather than defending that conduct in dealing with another party? This might seem to present a clear dividing line. For example, suppose the corporation asks its tax and corporate lawyers to assist it in reorganizing so that it may attribute an increased amount of income to a foreign subsidiary in order to reduce its U.S. tax liability. Now, the lawyer has no need to defend past conduct. Nor does the lawyer have an opponent who will engage in its own efforts to investigate the corporation's conduct and formulate a view, which it might present to a tribunal, about whether or not the conduct was lawful. The attorney is the only one in a position, for the moment, to deter the corporation from engaging in wrongdoing, assuming the tax strategy is impermissible.

lawyers may adopt aggressive legal interpretations and exploit legal loopholes. This conception of the corporate counselor's role is obviously at odds with the earlier conception that corporate lawyers encouraged corporate clients to comply with the "spirit," as well as letter of the law.

If one starts with the ABA's premise that corporate counseling can involve "progressive advocacy" and that advocates may take imaginative legal positions on their clients' behalf, then the work of the tobacco industry lawyers becomes more easily explicable. To be sure, the lawyers depicted in *The Cigarette Papers* were not defending B&W against lawsuits.⁸⁵ They seem to have been functioning as corporate lawyers, not litigators. Nonetheless, B&W's lawyers might have regarded their work as yet another form of advocacy in either of two respects.

First, by giving legal advice about the company's ongoing operations, the lawyers were engaged in the defense of future lawsuits and regulatory proceedings. Although the lawyers did not know precisely who would bring the future actions, and although those actions might be premised on corporate conduct that had not yet occurred, nevertheless, the lawyers could easily anticipate that someone someday was going to proceed against B&W. Therefore, they may have understood, as corporate lawyers rendering legal advice and assistance in planning future business activities, that they were one part advocates. Their role was to help B&W anticipate and thwart legal actions that might be brought against them in the future.

Alternatively, the lawyers may have conceptualized that their client was even then engaged in advocacy. The battle was not taking place in a courtroom, however, but in the court of popular opinion. On one side were an array of consumers, health care professionals, members of the scientific community, and others who sought to convince the public of the hazards of smoking. On the other side were the tobacco companies, which clung to the position that the scientific evidence was inconclusive, a position that, if dubious given what B&W and its lawyers knew, was perhaps not "frivolous."

In either case, it may have seemed natural for B&W's lawyers to function like trial lawyers who marshal the evidence most favorable to the client's position, husband evidence that is prejudicial to the client's

85. Cancer victims had brought lawsuits against cigarette manufacturers as early as the 1960s. See, e.g., *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962). However, the work of the particular lawyers described in *The Cigarette Papers* did not involve advocacy in pending litigation.

cause (subject to legal disclosure obligations that the lawyers interpret as narrowly as possible), and exploit ambiguities in the law. These lawyers did essentially the same things. They assisted their client's efforts to prevent the public dissemination of unfavorable scientific studies, in part, by adopting an extreme position concerning the law governing the attorney-client privilege. They assisted B&W in putting forward the scientific research that was most favorable to its position, which was inconclusive medical knowledge about the health effects of smoking. They helped B&W portray, in the most favorable light, its attitude toward the advancement of scientific knowledge.

From the perspective of the ABA norms, the lawyers engaged in acceptable advocacy, as long as they did not cross the line by knowingly advising their client to act fraudulently or criminally or by assisting their client in conduct that, after resolving legal and factual doubts in their client's favor, the lawyers knew to be fraudulent or criminal. While Robert Gordon may be right that the tobacco lawyers abetted their clients' "misdeeds," it is not clear from *The Cigarette Papers* that those "misdeeds" consisted of fraudulent or criminal conduct of which the lawyers knew. Granted, the book's account would easily support the view that B&W's conduct was antisocial; it was meant to deceive the general public; it was possibly, but not certainly, tortious; and by common societal standards, it was immoral, indecent, or unconscionable. B&W engaged in "misdeeds" in these senses, and the lawyers assisted. But if this is what is meant by "misdeeds," it would not be fair to say that the lawyers acted contrary to contemporary professional expectations as expressed by the ABA.

From the early account in *The Cigarette Papers*, however, one would be hard pressed to conclude that B&W's lawyers knowingly assisted "misdeeds" in the disciplinary sense—or in other words, that they knowingly assisted B&W in criminal or fraudulent conduct.⁸⁶ They sought to discourage federal regulatory authorities from imposing greater restrictions on the sale of tobacco products, but they did not seek to assist B&W in evading existing federal administrative regulations. They sought to reduce the possibility that a tort plaintiff would be able to gather evidence that would be useful in a future tort action, but the book does not indicate that they knowingly assisted corporate

86. Obviously, more is becoming known all the time about the past conduct of the tobacco companies and the tobacco industry lawyers. See GLANTZ ET AL., *supra* note 11. No doubt, a fuller account than that of Professor Glantz and his co-authors will one day be written, and that account may portray the tobacco lawyers' conduct very differently and more nefariously. This Article, however, limits itself to the earlier account, which serves as a point of departure for ruminations about the evolving role of corporate lawyers more generally.

conduct that the lawyers necessarily regarded as tortious. Indeed, as of today, even after all the revelations in *The Cigarette Papers* and opportunities for formal discovery, tort plaintiffs have had a relatively meager record of success against the tobacco companies. Given the state of tort law in the period covered by the purloined memoranda, it seems doubtful that the tobacco lawyers *knew* that their client's production and marketing of tobacco products was necessarily tortious. But even if they did, their conduct would pass muster under the current disciplinary rules, as long as the conduct they facilitated was not criminal.

Nor can one conclude that B&W's public relations campaign was necessarily *fraudulent*. To be sure, the campaign was deceptive in the extreme. It was designed to deceive the general public into believing that the scientific evidence about the health effects of tobacco was less clear than in fact it was. It was designed to deceive the general public about the tobacco companies' own knowledge and beliefs or to suggest that the companies themselves believed that the hazards of smoking were unproven. In addition, the campaign was designed to make the public believe that the tobacco companies were supporting objective scientific research, and public disclosure of its results to advance the existing scientific knowledge, when in fact they were doing nothing of the sort. Deceptive, to be sure. But it is far from clear that this was actionable fraud⁸⁷ and that the lawyers *knew* at the time that it was actionable fraud.

Wholly apart from the question whether it was generally permissible for the lawyers to abet B&W's conduct, questions might be raised about *how* the lawyers lent assistance. Various acts described in *The Cigarette Papers* seem objectionable. Chief among these acts, the lawyers laid the groundwork for what would have seemed to be an obviously bogus claim of privilege regarding records of scientific research in B&W's possession. B&W's lawyers knew, or should have known, that if the privilege was later claimed and challenged, it would have little chance of prevailing. It is objectionable, but is it professionally improper? During the period covered by the memoranda, B&W's lawyers did not have occasion to claim the attorney-client privilege or work-product privilege on the company's behalf. They simply en-

87. Whether the tobacco companies intentionally perpetrated a fraud was at issue in a lawsuit recently brought by Empire Blue Cross and Blue Shield against several tobacco companies in a New York federal court. The case went to trial in March, 2001. Daniel Wise, *Smoking Guns and Counterpunches Highlight Tobacco Trial Openings*, N.Y.L.J., Mar. 28, 2001, at 1. It resulted in the jury's rejection of damage claims based on the companies' alleged misrepresentations, but an award of damages for violations of the state's Consumer Protection Act. Mark Hamblett, *Blue Cross Wins Limited Victory in Tobacco Suit*, N.Y.L.J., June 5, 2001.

gaged in an imaginative effort to put the company in the best position to claim a privilege if the occasion to do so ever arose. Presumably, they did so anticipating that, if they carefully structured how the company handled scientific research, the company would have some chance, even if remote, to prevail on a claim of privilege. The lawyers were setting the stage for what the ABA calls "progressive advocacy," trying to move the attorney-client privilege in a direction favorable to their client.

One might also blanch at memoranda contemplating the possibility of destroying documents or shipping them overseas, acts presumably intended to prevent future plaintiffs and regulatory agencies from obtaining the documents. But lawyers often assist their corporate clients in designing document "retention" systems, which are actually document "destruction" systems, developed with an eye toward reducing the availability of damaging documents in the event of a future lawsuit.⁸⁸ Further, Professor Glantz and his coauthors did not uncover any evidence that the lawyers ultimately urged this course on their clients. Thus, while one might view the proposed conduct as reprehensible and, perhaps, even illegal, there is no evidence that the lawyers ultimately carried it out. There is only evidence that they served as progressive advocates, exploring all the options to accomplish their client's narrow objectives.

Not only did the tobacco industry lawyers' conduct accord generally with the contemporary conception of the corporate lawyer's role, but that conception has become so prevalent that many lawyers today may be unable to contemplate the alternative. Sol Linowitz has suggested that tobacco industry lawyers should have told their clients, in Elihu Root's words, that they are "damned fools and should stop." But, how would the conversation go?

"Now that you know that tobacco is lethal and addictive, you might give some thought to letting customers know and, perhaps, even to getting out of the business."

"Are you crazy? It's legal to sell cigarettes. And no law requires us to warn our customers. Why should we discourage them from buying cigarettes or stop selling them?"

"Well, perhaps part of the reason it's legal is that consumers don't fully comprehend the risks. Maybe you should tell them what you know."

88. Cf. HAZARD, *supra* note 22, at 85 (noting cynical approach lawyers take when dealing with prejudicial documents).

"We have an obligation to our shareholders. Our responsibility is to make a profit for them."

"Perhaps if your shareholders knew that they were selling a lethal product, they wouldn't want to profit in this way. Don't you have some obligation to tell them?"

"Our shareholders are mostly institutions, pension funds, money market funds. They don't care. Their job is to make money."

It is hard to imagine the contemporary corporate lawyer initiating the conversation, much less pressing on.

If, as it seems, the tobacco industry lawyers' conduct was consistent with the contemporary professional norms, and it would now be unimaginable to many in the legal profession that the tobacco lawyers would have functioned according to the traditional conception of the "wise counselor," then why does their conduct seem discomforting? Perhaps one's reaction is that the lawyers should never have provided their professional services to B&W knowing that the company was marketing a dangerous product to individuals, including children, who were not wholly aware of the health hazard, and who, in any event, because of the addictiveness of the product, were not fully capable of avoiding that hazard. Perhaps, one might conclude, there are potential clients that no lawyer in good conscience should represent and that the tobacco companies were one of them. Yet, it seems unlikely that this view would be widely shared within the profession. One might make a personal decision not to lend services to a tobacco company or other morally objectionable clients, but one would be hard pressed to convince the bar that there is a class of corporate clients that, although engaged in lawful conduct, simply should not be represented.

Alternatively, one's reaction might be that, while it was permissible to lend one's services to a tobacco company, the lawyers should not have represented them in the manner that they did.⁸⁹ Perhaps it was acceptable to give legal advice, but not to take an active role in B&W's business by, for example, helping to structure the company's relationship with researchers and serving as a conduit for research reports. Yet, corporate lawyers customarily assist their clients in planning their activities in light of legal and regulatory requirements and

89. Cf. Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 579-580 (1994) (arguing that "lawyers should accept moral responsibility [for the corporate client's conduct] when they perform functions in corporate governance that they have chosen collectively as well as individually For lawyers to deny any [moral] responsibility when they pull [legal levers to control corporate conduct] is self serving to say the least.").

act as agents on their clients' behalf. Perhaps it was disquieting that the lawyers premised their activities on such an aggressive reading of the law of attorney-client privilege. But, if corporate clients generally are entitled to progressive and imaginative advocacy, what principle would justify singling out tobacco companies as clients that may receive only half-hearted, humdrum assistance? If lawyers were permitted to represent tobacco companies at all, then surely they were permitted to represent them the same way other lawyers represent other corporate clients.

Perhaps what is disturbing is not that the lawyers' conduct was at odds with professional expectations, but that their conduct was at odds with what is generally expected of moral individuals. Although B&W may not have been acting illegally, it acted immorally and irresponsibly by marketing a dangerous product to vulnerable people, including children, in a misleading manner. What would we expect of anyone else who had a special relationship with such a destructive actor? Surely, we would want him to discourage the dangerous conduct, to give "wise counsel," and not to provide cheerful assistance. If B&W's lawyers did nothing different from what the legal profession generally expects of corporate lawyers, then perhaps our discomfort comes from the growing gap between the norms of corporate legal representation and our common or societal norms.

How did the corporate bar move from the ideal of the "wise counselor," a conception that mirrors ordinary societal norms, to the ideal of a "hired gun?" In recent years, commentators have identified changes in the marketplace for legal services, changes in the organization of the bar, and other social forces that may have fueled this transformation. For example, Abram and Antonia Chayes credited the narrowing of outside corporate lawyers' role, together with corporations' decreased reliance on a single law firm: "Both of these developments necessarily promote an instrumental conception of outside lawyers. They tend more to be 'hired guns,' chosen for a particular job, and less and less members of an ongoing relationship with responsibility for the client's overall well-being."⁹⁰ Russell Pearce discusses but takes issue with others' claim that the traditional ideology collapsed beginning in the 1960s because of "developments in the legal services market, ethical rules governing marketing of legal services,

90. Chayes & Chayes, *supra* note 4, at 294. These forces do not seem terribly significant in the case of the tobacco industry lawyers, however. B&W's lawyers were not rendering discrete services or retained for a limited period of time, but rendered a broad array of services over the course of several decades.

legal education, and the diversity of bar membership,”⁹¹ and he attributes the erosion of the governing class ideology to four other factors: “growing distrust of disinterested expertise, a surge in individualism, redefinition of the public good, and the development of a pro bono ethical duty.”⁹² However, it is hard to know, in general, which of the identified changes are the cause of the changing professional conception and which are merely symptomatic.

It is equally hard to know what this particular change says about the evolution of professional norms more generally. That is largely because it was never clear in the first place why lawyers should encourage their corporate clients to engage in socially responsible behavior. One might understand the bar’s contemporary movement toward the adversary ethic in any of the following different ways, depending on how one understands the traditional “wise counselor” conception.

First, one can understand the traditional conception in terms of conventional professional norms. In general, the professional understanding has always been that clients define the scope and objectives of the representation. It might be posited that lawyers once were expected to encourage corporate clients to be socially responsible, engage in fair dealing, and comply with the spirit of the law, simply because that is the kind of advice that corporate clients wanted at the time. As a matter of self-interest, corporations may have sought a reputation in the marketplace for fairness; or, to forestall government regulation, corporations might have engaged in self-regulation. Lawyers abandoned the traditional role when corporate clients came to define the scope of the representation differently and more narrowly, for example, as generally limited to advice about the letter of the law. Or, lawyers switched roles because corporate managers defined the corporation’s objectives more narrowly. In other words, lawyers stopped being “wise counselors” because corporations no longer wanted to retain “wise counselors.”

Second, corporate lawyers may have reconceptualized their professional role because they have reconceptualized the societal obligations and objectives of their corporate clients.⁹³ One possibility is that lawyers in the early twentieth century understood that corporations, as

91. Pearce, *supra* note 27.

92. *Id.*

93. For a discussion of evolving understandings of corporate social responsibility, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201. See also Henry Hansmann & Reinier, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Symposium, *Corporate Social Responsibility: Paradigm or Paradox*, 84 CORNELL L. REV. 5 (1999).

creatures of the state, had social responsibilities that individuals did not have; whereas individuals could pursue their self-interest exclusively, corporations had some responsibility to act for the public good. Corporate lawyers were expected to influence corporations to engage in socially responsible conduct because intrinsic to being a corporation was an obligation to act for the public good. Later, the idea of corporate social responsibility changed within both the business community and the legal community. Lawyers have come to understand that the corporation's responsibility is primarily to make money for shareholders. Therefore, assisting the corporation in carrying out its objectives no longer means encouraging conduct for the public interest.

Third, early twentieth century lawyers may have recognized that, as juridical entities, corporations did not have the same interest in dignity and autonomy as individuals. Extreme partisanship may make sense when representing an individual, at least in litigation, because of the importance of protecting the individual's dignity and autonomy. But this rationale for an adversary ethic would not make sense in the case of a corporation. Later, as lawyers took a more anthropomorphic view of corporations by viewing them not as juridical entities, but as juridical persons, the distinction broke down. Consequently, the adversary norms, which developed in criminal cases in which lawyers defended individuals accused of crime and then spilled over into the representation of all individuals in adjudicatory contexts, eventually spilled over into the representation of corporations as well.

Fourth, the movement from "wise counselor" to "hired gun" may signal a change in how lawyers understand the relationship between corporate lawyers and corporate managers. Lawyers might conceive that corporations have social responsibilities beyond maximizing wealth. But the question remains, who decides in the course of the representation what those responsibilities are and how they should be carried out? The earlier understanding may have been that lawyers, either because of their superior expertise or because of their responsibilities as agents of the corporation, have a fiduciary duty to identify the corporation's social responsibilities, as well as its legal responsibilities. That was what it meant to be a competent corporate lawyer. Over time, however, lawyers may have adopted a narrower role because they came to understand that corporate managers are better qualified than lawyers to identify corporate responsibilities aside from compliance with the letter of the law. Even though corporations intrinsically have obligations and objectives that should lead them to comply with the spirit of the law and deal fairly with others, it is the

corporate manager, not the corporate lawyer, who is entrusted to identify these obligations and objectives.⁹⁴

Fifth, the bar may retain the norm of "wise counseling" in contexts in which lawyers serve as counselors, but conceive of the corporate lawyer's involvement in business matters as enough of an advocacy role to make the adversary ethic applicable. As noted, the line between counseling and advocacy is indistinct in situations where lawyers give business advice or structure their clients' business dealings with one eye on the risk of a civil lawsuit or a regulatory enforcement proceeding.⁹⁵ Perhaps it is the rare situation, such as providing advice to a client regarding estate planning, where the lawyer is exclusively a counselor and, therefore, the traditional norms might apply.⁹⁶ Elsewhere, when the lawyer is one part counselor and one part advocate, the adversary ethic may predominate.

Sixth, the contemporary bar may have a different view of lawyers' social responsibility or of how best to achieve lawyers' public objectives. Commentators have attributed the ideal of the lawyer as independent counselor to various political philosophies; for example, William Simon has traced its philosophical roots in twentieth century progressivism,⁹⁷ while Russell Pearce has rooted it in nineteenth century civic republicanism.⁹⁸ In either case, the ideal may be rooted in an understanding that lawyers are essentially supposed to engage in social betterment, which is no longer accepted within the profession. Alternatively, just as partisan advocacy is assumed to serve the ends of justice in adjudicative proceedings, the profession may now assume, paradoxically, that the public good is best served if lawyers serve their

94. A similar view might explain why lawyers who represent government agencies may defer to government officials concerning the conduct of the representation, notwithstanding the traditional understanding that government lawyers have a duty to "do justice" in civil as well as criminal litigation. Government lawyers may acknowledge the general obligation but conclude that agency officials have the right or duty to determine what doing justice means in a given case. See generally Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

95. See ABA Brief, *supra* note 77 and accompanying text.

96. Even in the context of estate planning, the lawyer's role may have an adversarial aspect, however. For example, lawyers who assist clients in transferring assets offshore to avoid creditors might adopt aggressive readings of fraudulent conveyance and bankruptcy provisions. See generally Craig H. Averch & Blake L. Berryman, *Attorney Liability for the Client's Fraudulent Transfer: Two Theories*, 7 J. BANKR. L. & PRAC. 495 (1998).

97. William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565-71 (1985).

98. See Pearce, *supra* note 27; see also Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983); Margali Sarfatti Larson, *On the Nostalgic View of Lawyers' Role: Comment on Kagan and Rosen's "On the Social Significance of Large Law Firm Practice"*, 37 STAN. L. REV. 445, 451 (1985).

corporate clients' narrow and self-interested objectives and do not explicitly urge their corporate clients to act in a socially responsible manner, as a "wise counselor" would. If so, *The Cigarette Papers* belies that assumption.

Finally, the corporate bar's movement toward the adversary ethic may reflect a different understanding of the relationship between lawyers' personal moral or prevailing political beliefs, on one hand, and their professional obligations, on the other. Whatever the lawyer's political or moral philosophy may be, it is legitimate for the lawyer to interject his philosophy into the representation only if the lawyer understands that personal values play a legitimate role in legal representation.⁹⁹ The early ideal of independent counseling may have reflected an understanding that a lawyer is not only permitted to interject his personal beliefs into the representation of a client, but it is laudable to do so. The contemporary movement toward the adversary ethic may reflect discomfort with this understanding, perhaps because lawyers can no longer identify their own moral beliefs because they lack confidence in those beliefs, or because they think clients should not have to pay to hear lawyers express their beliefs.

V. CONCLUSION

However one understands the normative shift from "wise counselor" to "hired gun," one's discomfort with the tobacco lawyers' conduct suggests the need to consider whether the change is desirable. On reflection, the ABA might elect to return to the "wise counselor" ethic, not out of nostalgia for the past, but for other more compelling reasons: for example, because this ethic reflects a better understanding of the social responsibility of the corporate lawyer, wholly apart from how one understands the social responsibility of the corporation; because it allows lawyers to integrate their personal moral beliefs into their professional lives, thereby offering lawyers greater professional satisfaction; or because the adversary ethic simply makes less sense as an alternative in the business context. Or maybe, just maybe, the ABA should encourage corporate lawyers to serve as "wise counselors" because studies such as *The Cigarette Papers* make the legal profession embarrassed by the consequences of the alternative.

99. See generally Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997).

